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ERIC'S LTD UPDATE

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Eric Schjerner is a mediator with 10 years of mediating LTD and other insurance disputes, a former litigator with over 3 decades of LTD trial work, and the author of 2 editions of the book **Disability Insurance Law in Canada** (with the Third Edition coming out soon, see below).

To look for available mediation dates or to book a mediation with Eric, visit [Schjerner Mediations](#) or simply email Eric at: eric@schjernermediations.com.

Eric Schjerner

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Comments:

I hope everyone had a pleasant, relatively normal, COVID-free summer. With most of our vacation time behind us it is time to look at recent LTD case law. This update contains two interesting cases on extracontractual damages, one from Ontario and one from British Columbia.

These two cases will be among over 150 new cases which have been added to the Third Edition of my book, **Disability Insurance Law in Canada**. The Third Edition is roughly 30% longer than the Second Edition and also contains new Chapters on Evidentiary Considerations in LTD trials; Mediation Tips; and Key Issues When Representing Plaintiff LTD Claimants. The manuscript has just been sent to Thomson Reuters for final polishing and should be released in early 2023.

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EXTRACONTRACTUAL DAMAGES

- (i) *Baker v. Blue Cross Life Insurance Company* (2022 Ont. S.C.J. jury decision)
- (ii) *Stewart v. Lloyd's Underwriters*, 2022 BCCA 84

(i) *Baker v. Blue Cross Life Insurance Company*

A June 2022 Ontario Superior Court of Justice jury decision. The plaintiff was a 47-year-old (at time of trial) hospital director who had suffered a stroke. Blue Cross had 13 hours of surveillance video (the presiding judge allowed 2 hours to be played for the jury) and asserted that this demonstrated the plaintiff's ability to perform at a reasonably commensurate occupation. An IME expert supported this position. The plaintiff's treating neurologist, however, testified that ongoing cognitive issues prevented the plaintiff from performing any alternative employment.

The jury found that: (i) LTD benefits should be reinstated, (ii) \$40,000 in aggravated damages be paid, and (iii) \$1.5 million in punitive damages be paid.

NOTE: As of the date of this Update going to print, no Notice of Appeal had been filed by Blue Cross, although from speaking with plaintiff's counsel, one is expected.

(ii) *Stewart v. Lloyd's Underwriters*, 2022 BCCA 84

A travel insurance case in which Lloyd's was successful in overturning a \$100,000 punitive damages award.

The B.C. Court of Appeal made two noteworthy findings:

(188) In my opinion, punitive damages must be based upon the conduct of the defendant which affects the plaintiff without taking into account conduct to the world at large.

...

(215) There is also no jurisprudence of which I am aware where an award of punitive damages was made against an insurer for conduct that occurred after it accepted coverage. For instance, *Whiten* and *Asselstine* BCCA both involved situations where the insurer denied coverage and maintained that denial throughout to the conclusion of the trial.

(216) It bears emphasizing that the decision to afford coverage in this case was made in mid-December 2018, three-and-a half months before the scheduled trial date, and the settlement of the known claims occurred prior to the commencement of the trial.

...

(219) It is difficult for me to envision a situation where conduct by an insurer which resulted in third-party claims against its insured being resolved within the policy limits could satisfy the legal requirements for an award of punitive damages in favour of the insured...

Query whether LTD insurers can rely upon the *Stewart* decision to argue that punitive damages cannot be awarded if the claim was ultimately accepted prior to trial. No doubt plaintiff counsel will argue that Courts must place some parameters on any such rulings so that a horribly handled claim could not escape an award of punitive damages if the claim was paid hours before trial. Perhaps future editions of Eric's LTD Updates will cover this issue.

ACKNOWLEDGEMENTS

Eric's LTD Updates are possible through case law sent to me by dozens of LTD counsel. For this issue many thanks to Stephen Birman of Thomson Rogers in Toronto and to JoAnn Carmichael of Alexander Holburn in Vancouver.

For any questions on these or on other LTD cases, or if you have a case you wish to share, please email Eric at eric@schjerningmediations.com, or call 416-236-9282.

